SIA PANG LIONG

v.

PP

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ (MALAYA)
MOHD GHAZALI YUSOFF FCJ
RAUS SHARIF PCA
[CRIMINAL APPEAL NO: 05-103-2010(B)]
5 OCTOBER 2011

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 2600.7 grams of heroin - Conviction and sentence - Appeal against - Doubt in identity of drug exhibits - Whether there was a break in chain of evidence as to movement of exhibits - Whether drug exhibits analysed by chemist the same drug exhibits recovered from appellant - Failure to call material witness - Whether conviction unsafe*

CRIMINAL PROCEDURE: *Appeal - Conviction and sentence, against - Trafficking in 2600.7 grams of heroin - Doubt in identity of drug exhibits - Whether there was a break in chain of evidence as to movement of exhibits - Whether drug exhibits analysed by chemist the same drug exhibits recovered from appellant - Failure to call material witness - Whether conviction unsafe*

The appellant was charged with trafficking in 2600.7 grams of heroin, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). He was convicted and sentenced to death by the High Court, which was affirmed by the Court of Appeal. Briefly, the facts showed that the appellant had been arrested at the Kuala Lumpur International Airport with four packets strapped to the appellant's legs. It was found that the four packets contained heroin. In this appeal against the said conviction and sentence, the appellant raised one ground of appeal, *ie*, the failure of the prosecution to explain the movement of the drug exhibits for a period of one month which was from 29 September 2003 to 28 October 2003, the period when the drug exhibits were in possession of the forensic expert, ASP Izanizam. According to the appellant, ASP Izanizam was not called as a witness by the prosecution to explain what he did with the drug exhibits and that the non-calling of ASP Izanizam had created a doubt to the prosecution's case. The Deputy Public Prosecutor ('DPP') however submitted that it was too late for the defence to raise the issue of the possibility of the drug exhibits being mixed up or

A that it had been tampered with when it was in the possession of ASP Izanizam, especially when the trial judge and the Court of Appeal had made a concurrent finding of facts that there was no break in the chain of evidence relating to the movement of the drug exhibits.

B

Held (allowing appeal; setting aside conviction and sentence) Per Raus Sharif PCA delivering the judgment of the court:

(1) It is the burden of the prosecution to adduce evidence that the drug exhibits that were recovered from the appellant and C that were sent to the chemist for analysis were the same drug exhibits that the appellant was charged with. (para 11)

(2) The facts showed that PW4 handed over the exhibits recovered from the appellant to PW7 on 28 September 2003. D The next day, on 29 September 2003, PW7 handed over the drug exhibits to ASP Izanizam. It appeared that PW7 after collecting back the drug exhibits from ASP Izanizam, packed the drug exhibits and sent them to the chemist. However, there was no indication in his evidence that the drug exhibits E he received from ASP Izanizam on 28 October 2003 were the same drug exhibits that he sent to ASP Izanizam on 29 September 2003. (paras 12 & 14)

(3) The absence of positive identification by PW7 on the drug F exhibits that he collected from ASP Izanizam were the same drug exhibits that he sent to ASP Izanizam earlier had put into doubt whether the drug exhibits that were analysed by the chemist were the same drug exhibits recovered from the appellant. (para 16)

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(4) ASP Izanizam should have been called by the prosecution as its witness, bearing in mind that the drug exhibits were in ASP Izanizam's custody for almost a month. If he had been called as a witness, he could have explained what he did with the H drug exhibits, in particular, as to how the drug exhibits were kept during the said period. Most importantly, he could have also identified the drug exhibits. But, this did not happen in this case. This had raised a doubt as to the identity of the drug exhibits. Therefore, benefit of the doubt was given to the appellant. Thus, the conviction of the appellant was not safe. I (para 17)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah dituduh mengedar 2600.7 gram heroin, satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Beliau disabit dan dihukum mati oleh Mahkamah Tinggi, yang telah disahkan oleh Mahkamah Rayuan. Secara ringkas, fakta menunjukkan bahawa perayu telah ditahan di Lapangan Terbang Antarabangsa Kuala Lumpur dengan empat bungkusan diikat di kaki perayu. Didapati bahawa keempat-empat bungkusan tersebut mengandungi heroin. Di dalam rayuan ini terhadap sabitan dan hukuman, perayu telah membangkitkan satu alasan rayuan, iaitu, kegagalan pihak pendakwaan untuk menjelaskan pergerakan eksibit-eksibit dadah bagi tempoh satu bulan daripada 29 September 2003 sehingga 28 Oktober 2003, tempoh bila eksibit-eksibit dadah berada di dalam milikan pakar forensik, ASP Izanizam. Menurut perayu, ASP Izanizam tidak dipanggil sebagai saksi oleh pihak pendakwaan untuk menjelaskan bagaimana beliau mengendali eksibit-eksibit dadah dan kegagalan memanggil ASP Izanizam telah mewujudkan keraguan kepada kes pendakwaan. Timbalan Pendakwa Raya ('TPR'), walau bagaimanapun, telah berhujah bahawa ia terlalu lewat untuk pihak pembelaan membangkitkan isu kemungkinan eksibit-eksibit dadah telah tersalah campur atau telah diusik apabila berada di dalam milikan ASP Izanizam, terutama sekali apabila hakim bicara dan Mahkamah Rayuan telah membuat dapatan fakta serentak bahawa tiada pencelahan dalam rangkaian keterangan berhubungan pergerakan eksibit-eksibit dadah.

Diputuskan (membenarkan rayuan; mengenepikan sabitan dan hukuman)
Oleh Raus Sharif PMR menyampaikan penghakiman mahkamah:

(1) Ia adalah beban pendakwaan untuk mengemukakan keterangan bahawa eksibit-eksibit dadah yang dijumpai daripada perayu dan telah dihantar kepada ahli kimia untuk analisis adalah eksibit-eksibit dadah yang perayu didakwa mengedar.

(2) Fakta-fakta menunjukkan bahawa PW4 telah memberi eksibit-eksibit yang dijumpai daripada perayu kepada PW7 pada 28 September 2003. Pada keesokan harinya, 29 September 2003, PW7 memberi eksibit-eksibit tersebut kepada ASP Izanizam. PW7, selepas mengambil eksibit-eksibit dadah daripada ASP Izanizam, telah membungkus eksibit-eksibit dadah dan menghantarnya ke ahli kimia. Tetapi, tiada petunjuk

di dalam keterangannya bahawa eksibit-eksibit dadah yang beliau terima daripada ASP Izanizam pada 28 Oktober 2003 adalah eksibit-eksibit dadah yang sama dengan apa yang telah beliau serah pada ASP Izanizam pada 29 September 2003.

(3) Ketiadaan pengenalan positif oleh PW7 ke atas eksibit-eksibit dadah yang beliau telah ambil dari ASP Izanizam adalah eksibit-eksibit dadah yang sama yang telah diserah kepada ASP Izanizam sebelum ini telah mewujudkan keraguan sama ada eksibit-eksibit dadah yang telah dianalisis oleh ahli kimia adalah eksibit-eksibit dadah yang telah dijumpai daripada perayu.

(4) ASP Izanizam sepatutnya dipanggil oleh pihak pendakwaan sebagai saksi, mengambil kira bahawa eksibit-eksibit dadah berada di dalam jagaannya untuk hampir sebulan. Jika beliau dipanggil sebagai saksi, beliau boleh menjelaskan bagaimana beliau mengendalikan eksibit-eksibit dadah khususnya tentang bagaimana eksibit-eksibit dadah itu disimpan semasa tempoh tersebut. Yang paling penting, beliau boleh mengenalpasti eksibit-eksibit dadah tersebut. Tetapi, ini tidak berlaku di dalam kes ini. Ini telah membangkitkan keraguan kepada identiti eksibit-eksibit dadah. Oleh itu, manfaat keraguan harus diberi kepada perayu. Dengan itu, sabitan perayu adalah tidak selamat.

Case(s) referred to:

Gunalan Ramachandran & Ors v. PP [2006] 1 CLJ 857 FC ***(refd)***
PP v. Munusamy [1980] 1 LNS 63 FC ***(refd)***
Satli Masot v. PP [1999] 2 SLR 637 ***(refd)***
Su Ah Ping v. PP [1979] 1 LNS 100 FC ***(refd)***

Legislation referred to:

Dangerous Drugs Act 1952, s. 39B(1)(a)

For the appellant - Sivananthan (Tina Ong with him); M/s Sivananthan
For the respondent - Saiful Edris Zainuddin; DPP

[Editor's note: For the Court of Appeal judgment, please see Sia Pang Liong v. PP [2011] 6 CLJ 759.]

Reported by Suhainah Wahiduddin

JUDGMENT

Raus Sharif PCA:

Introduction

[1] The appellant was charged for trafficking in 2600.7g of heroin, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA"). He was convicted and sentenced to death by the High Court. His conviction and sentence was affirmed by the Court of Appeal. He now appeals to this court.

Facts

[2] The facts of this case are well set out in the judgment of the Court of Appeal and we do not propose to repeat them here except to state briefly the following facts relevant to the issue raised in this appeal.

2.1 The appellant was arrested on 27 September 2003 at B2 Departure Gate of the Kuala Lumpur International Airport ("KLIA"). He was on his way to board flight MH2O to Paris.

2.2 Before his arrest, he was seen by Kunasegaran a/l Kandasamy (PW4), walking in a limping manner ("berjalan berjongket-jongket dengan keadaan tidak sempurna") when passing the metal detector. PW4 was then on duty, checking on passengers boarding flight MH2O to Paris.

2.3 PW4 conducted a search on the appellant and found something bulky stuck to the appellant's right calf. PW4 immediately contacted the narcotic officers from the Narcotic Department of KLIA.

2.4 Detective Sergeant Alias bin Karim (PW5) and another officer came to Gate B2 and brought the appellant to a room next to Gate B2 for a body search in the presence of PW4. It was found that there were four packets strapped to the appellant's legs. One packet was strapped with a knee guard to each side of the appellant's thigh and one packet was strapped with a transparent plastic to each side of the appellant's calves.

2.5 It was found that the four packets contained white powdery substance covered with black powdery substance. The contents of each of the four packets were analysed by the chemist, Halimah binti Abdul Rahman (PW2) and they were found to contain a total of 2600.7g of heroin.

2.6 The appellant in his defence did not dispute that the four plastic packets were strapped around his legs and he was on the way to board the flight MH20 to Paris. However, he denied having knowledge that the four packets contained dangerous drugs. He believed that the four plastic packets contained Chinese medicine.

Submissions

[3] Before this court, En Sivanathan, learned counsel for the appellant, raised only one ground of appeal, ie, the failure of the prosecution to explain the movement of the drug exhibits for a period of one month which is from 29 September 2003 to 28 October 2003. This was the period when the drug exhibits were in possession of the forensic expert, ASP Izanizam.

[4] The complaint by the learned counsel is that ASP Izanizam was not called as a witness by the prosecution to explain what he did with the drug exhibits in particular as to how the drug exhibits were kept. He contended that the non-calling of ASP Izanizam had created doubt to the prosecution's case as the prosecution had failed to eliminate the possibility of mixing up of the drug exhibits with other exhibits or that the drug exhibits being tempered with when they were in possession of ASP Izanizam.

[5] The learned Deputy Public Prosecutor, En Saiful Edris bin Hj Zainuddin ("DPP") submitted that the issue raised by the learned counsel was never an issue before the High Court as well as the Court of Appeal. According to him, the appellant's only defence was that he had no knowledge that the four packets strapped to his legs contained dangerous drugs. Thus, he contended that it is too late in the day for the defence to raise, the issue of the possibility of the drug exhibits being mixed up or that it had being tempered with when it was in possession of ASP Izanizam. This is especially so when the learned trial judge and the Court of Appeal had made a concurrent finding of facts that there was no break in the chain of evidence relating to the movement of the drug exhibits.

Decision

[6] Thus, the crucial question in this case is whether the drug exhibits which had been produced at the trial were the same exhibits that were seized by PW4 from the appellant. The learned High Court found them to be the same exhibits. He held as follows:

> [27] Berdasarkan keterangan SP2, SP4, SP5 dan SP7 khususnya yang dibuat di atas, saya berpuashati bahawa walaupun ASP lzanizam tidak dipanggil memberi keterangan rantaian keterangan bagi barangan kes 'Al', 'A2', 'B1' dan 'B2' dan kandungannya tidak terputus.
>
> [28] Saya juga berpuashati bahawa bungkusan itu dan kandungannya merupakan barang kes yang ditemui pada peha dan betis Tertuduh pada malam kejadian. Bungkusan dan kandungan itu jugalah yang telah kemudiannya dianalisis oleh SP2 yang mendapati bahawa serbuk putih dalam bungkusan putih dalam bungkusan di bahagian 'A1', 'A2', 'B1' dan 'B2' itu mengandungi heroin sejumlah 2600.7 gram.

[7] The Court of Appeal holds the same view. It held as follows:

> [31] On the evidence available we had no reason to disagree with the finding of the trial judge on this issue. We were satisfied that the same drug exhibits which were recovered from the appellant were sent to the Chemist for analysis and later tendered in court. There was no basis to the defence's allegation that the drug exhibits had been tampered with or there was a break in the chain of evidence and handling of the drug exhibits.
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> [32] PW4 confirmed and identified all the 4 plastic packets which contained the prescribed drugs seized from the appellant. The same exhibits were handed over to the investigating officer, PW7, at about 3.30 am on 28 September 2002, which was about 4 hours after the drug exhibits were recovered from the appellant. PW7 handed over the drug exhibits to the Forensic Department for fingerprint analysis, then to PW3 for DNA analysis and finally to PW2 for drugs analysis. PW7 later received the drug exhibits back from PW2 and sent them to PW1, the storekeeper for safe keeping. PW2, PW4 and PW7 identified the exhibits relating to the drugs in court.

[8] Both the High Court and the Court of Appeal have made a concurrent findings of facts that the drug exhibits produced in court were the same exhibits recovered from the appellant. It is

A trite law that it is not the practice of the apex court to review the concurrent findings of facts from the courts below. (see *PP v. Munusamy* [1980] 1 LNS 63). It is also trite law that while the prosecution bears the burden of proving beyond a reasonable doubt that there were no gaps in the chain of evidence, it does
B not follow that in order to establish the identity of the exhibit, all persons who had handled the exhibit must be called as witnesses. (see *Su Ah Ping v. PP* [1979] 1 LNS 100, *Satli bin Masot v. PP* [1999] 2 SLR 637, and *Gunalan Ramachandran & Ors v. PP* [2006] 1 CLJ 857).

C

[9] On the above authorities, it would appear that the non-calling of ASP Izanizam in this case would not be fatal to the prosecution's case. However, after going through the prosecution's evidence and in particular the evidence of the Investigating Officer
D (PW7), the appellant has strong basis to complain.

[10] In this case, it is not true that the identity of the drug exhibits was not disputed by the defence. PW7 was cross-examined on this issue. At p. 84 of the Record of Appeal, PW7 was asked:

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> Saya cadangkan barang-barang kes yang dirampas daripada OKT jika ada bukanlah barang-barang yang ada di Mahkamah hari ini.

[11] Thus, the identity of the drug exhibits was being challenged
F by the appellant. Once there is such a challenge, the prosecution bears the burden of proving beyond reasonable doubt that there are no gaps in the chain of evidence. It is the burden of the prosecution to adduce evidence that the drug exhibits that were recovered from the appellant and that were sent to the chemist
G for analysis were the same drug exhibits that the appellant was charged with.

[12] In this case, PW4 handed over all the exhibits recovered from the appellant to PW7 at about 3.30am on 28 September 2003. PW7 then put the exhibits into separate envelopes. For the
H drug exhibits, he put in envelope marked 'Al', 'A2', 'B1' and 'B2'. He then kept all the exhibits in his steel cabinet at his office at IPD Sepang. On the next day, ie, 29 September 2003, he took out the drug exhibits for the purpose of sending them to the

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Forensic Department for finger print analysis. He handed the drug exhibits to ASP Izanizam. His evidence is found at p. 77 of the Appeal Record which reads as follows: A

> Pada jam 1.10 tengah hari saya keluarkan barang kes dari peti kabinet di pejabat saya, iaitu barang kes bertanda 'Al', 'A2', 'B1' dan 'B2' dan berlepas bersama barang kes dan borang permohonan pengesanan cap jari ke Pejabat Forensik Maktab Cheras. B
>
> Saya tiba jam kurang 2.35 petang di pejabat itu.
>
> Saya telah serahkan barang kes itu dan borang permohonan pengesanan cap jari kepada Penolong Juru Analisa cap jari ASP Izanizam bin Salleh. C
>
> Says boleh camkan ASP Izanizam (ASP Izanizam bin Salleh dari Makmal Forensik Cheras dicamkan). D
>
> Kemudian saya terima resit.

[13] PW7 evidence on the same matter is further found at p. 85 of the Record of Appeal, where during re-examination he said as follows: E

> Pada 29/9/03 barang kes telah dihantar ke Bahagian Cap Jari Jabatan Forensik Maktab Cheras untuk analisis pengesanan cap jari.
>
> Saya terima semula barang kes itu pada 28/10/03. F
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> Barang kes dihantar ke Jabatan Kimia pada hari yang sama diterima daripada Jabatan Forensik. Barang kes tidak ada dalam simpanan saya sepanjang tempoh itu.

[14] It appears that PW7 after collecting back the drug exhibits from ASP Izanizam, packed the drug exhibits and sent them to the chemist. But nowhere in his evidence that he had indicated that the drug exhibits that he received from ASP Izanizam on 28 October 2003 were the same drug exhibits that he sent to ASP Izanizam on 29 September 2003. PW7 did not identify the drug exhibits to be the same exhibits. G H

[15] ASP Izanizam could have saved the situation, but he was not called as a witness for the prosecution. Through PW7, it was revealed that the findings of ASP Izanizam on the presence of finger print on the drug exhibits were negative. It was for that I

A reason (as argued by the DPP) ASP Izanizam was not called as a witness for the prosecution, but only offered as a witness to the defence.

[16] But, we are of the view that the absence of positive identification by PW7 on the drug exhibits that he collected from ASP Izanizam were the same drug exhibits that he sent to ASP Izanizam earlier had put into doubt whether the drug exhibits that were analysed by the chemist were the same drug exhibits recovered from the appellant.

[17] In the circumstances of this case, ASP lzanizam should have been called by the prosecution as its witness. This is bearing in mind that the drug exhibits were in ASP Izanizam's custody for almost a month. If he was called as a witness, he could have explained what he did with the drug exhibits in particular as to how the drug exhibits were kept during the said period. Most importantly, he could have also identified the drug exhibits. But, it did not happen in this case. This has raised a doubt as to the identity of the drug exhibits. Therefore, we are giving the benefit of the doubt to the appellant.

[18] For the above reasons, we find that the conviction of the appellant is not safe. Accordingly, we allowed the appeal. The conviction and sentence are set-aside.